No. 12020

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody & Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, Tax Collector for the County of Los Angeles, State of California,

Appellee.

Petition of Appellant for Rehearing With Argument and Points and Authorities in Support Thereof.

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Appellee.

PETITION OF APPELLANT FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now your petitioner, GEORGE T. GOGGIN, as Trustee in Bankruptcy for the estate of A. MOODY & CO., INC., bankrupt, and petitions the Court for a rehearing and reconsideration of the opinion and decree rendered by this Court on February 21, 1949, in the above entitled action affirming the judgment and order of the District Court and allowing appellee's claim in full as an administration expense as prayed for by appellee, for the reason that the said opinion and decree appear to your petitioner to have been based on a seriously erroneous conception of the contentions of the appellant and petitioner and of the law applicable thereto; and to some extent upon an erroneous conception of certain facts, as will hereafter appear in appellant's argument. And for the further reason that said opinion, in fact, will have the result of unduly

narrowing the intended purposes of Section 62 and of the first proviso of Section 64 of the Bankruptcy Act.

Wherefore, the appellant prays that a rehearing be granted herein.

/s/ George T. Goggin,
Appellant.

Frank C. Weller and
Russell B. Seymour,
By /s/ Russell B. Seymour,
Attorneys for Appellant.

United States of America,
Southern District of California,
Central Division,
County of Los Angeles,
State of California.

George T. Goggin, being duly sworn, deposes and says: That he is the appellant in the foregoing entitled matter; that he has read the Petition of Appellant for Rehearing and knows the contents thereof; that the same is true of his own knowledge, except as to the matter which are therein stated upon his information of belief, and as to those matters, that he believes them to be true

/s/ George T. Goggin.

Subscribed and sworn to before me this 21st day of March, 1949.

(Seal) /s/ Irene Garcia,
Notary Public in and for the County of Los Angeles, State of California.

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ARGUMENT, POINTS AND AUTHORITIES.

An examination of the opinion of this Court filed in connection with the affirmance of the judgment and order of the District Court indicates to us that in the preparation of the opinion the Court was laboring under a serious misapprehension of the contentions of the appellant and petitioner herein and of the law applicable thereto, and to some extent an erroneous conception of certain facts, as will hereafter appear.

The Court commencing with the first sentence of the second paragraph on page 3 of its opinion, states:

> (Note: For clarity and convenience ( ) have been added by counsel.)

(1) "The trustee's argument, as we understand it, is that the first proviso of this statute prohibits the payment of a tax to the extent that it is based on an assessment in excess of the value of the interest of the bankrupt estate in the property. We disagree. The proviso confers no authority on the court to reduce a tax claim unless the *tax* exceeds the value of the bankrupt's interest in the property. Glass v. Phillips, 5 Cir., 139 F. 2d 1016; *In re Ingersoll,* 10 Cir., 148 F. 2d 282. Such was not the case here. The property assessed was one lot of goods, part of which had come into the possession of the estate and was sold for more than the amount of the total tax."

Perhaps counsel have illy stated themselves, but we believe that at no point has the trustee contended that the first proviso prohibits the payment of a tax to the extent that it is based on an *assessment* in excess of the value of the interest of the bankrupt estate in the property. Our contention, as is indicated in Questions Presented I and II, at page 10 of Appellant's Opening Brief, and, we think, in the course of the oral argument, is directed to an application and a definition of the word "property" in the phrase "property of the bankrupt" contained in the First Proviso, *i. e.,* whether the pledged property should be included as a part of the assets of the estate upon which the assessed tax should be paid, when—first, neither the debtor, receiver, or trustee ever put the pledged property to any use or received anything from it, or even came into possession of it, and second, when an order of abandonment of that property was later made by the bankruptcy court.

Let us put the matter another way.

The free property was assessed for considerably more than the sum of about $27,000.00, the amount which the trustee received from a sale of the free property. The appellant is making no argument that the *assessment* of the free property should be reduced to the sum received for it; but on the other hand at all times has conceded that the full tax based on a full assessment of the free property should be paid, even though that assessment was actually higher than the amount which the appellant received from the free property.

But the appellant does complain when he is required to pay a *tax* on the pledged property, no matter what the amount of the assessment might have been, when no part of the pledged property ever came into the possession of, or under the control of, or brought any benefit to, the debtor, the receiver, or the trustee, and was actually abandoned within a reasonable time after the appointment of the trustee. *Hennepin County, Minn. v. M. W. Savage*, 8 Cir., 83 F. 2d 453. And see also 3 *Collier on Bankruptcy*, pp. 2137-38:

> "Under the proviso as extended by the 1938 Act to include both real and personal property, a needed element has been supplied. Any personal property incumbered, as by a chatel mortgage, or depreciated in value, may be abandoned by the trustee; or in the alternative evaluated as to the extent of the bankrupt's interest, as by a sale, and taxes paid on the basis of such evaluation."

(2) "We agree with the trial court that the subsequent abandonment of the pledged property did not operate to avoid the personal liability for taxes accrued while the debtor and the trustee were conducting the business pursuant to court order."

A major premise of the Court's opinion seems to be that the subsequent abandonment of the pledged property did not operate to avoid the personal liability for taxes accrued while the debtor and the trustee were conducting the business pursuant to court order.

May we point out that the trustee was not operating the business on the tax date. And also that neither the debtor in possession, nor the receiver, nor the trustee ever made any use of the pledged property at any time, particularly on the tax date. At no time was the pledged property utilized in respect to the operation of the business.

A discussion of the law relating hereto will be included under the next quotation from the opinion of the Court.

(3) "We find nothing in the Act which relieves the trustee or the debtor in possession from the payment of current taxes as they accrue. Cf. Boteler v. Ingels, 308 U. S. 57; Swarts v. Hammer, 194 U. S. 441; United States v. Killoren, 8 Cir., 119 F. 2d 364."

There do not appear to be any cases, referred to by either the appellee or the Court, which have allowed a tax as an expense of administration in any situation when at the tax date the trustee, receiver, or debtor in possession was neither in possession of the asset taxed nor made some use of such asset.

Boteler v. Ingels, supra, involved a tax on automobiles which on the tax date were actually being used by the trustee in the operation of the business.

Swarts v. Hammer, supra, involved a tax on property (money) in the possession of the trustee on the tax date; and also was decided long prior to the enactment of the First proviso.

United States v. Killoren, supra, merely holds that all claims of administration, including tax claims held to be administration expense, were of the same priority.

We have heretofore distinguished, and apparently this Court has disregarded, the authorities of the District Court supporting its theory on the effect of the order of abandonment, *In re Humeston,* 83 F. 2d 187, and *Robinson v. Dickey,* 36 F. 2d 147, by pointing out that in each case the trustee or receiver was in possession of and utilizing the asset taxed.

We have heretofore cited and quoted from a decision of the Third Circuit, *Northumberland County et al. v. Philadelphia & Reading Coal & Iron Co.,* 131 F. 2d 562, supported by a decision from the Eighth Circuit, *Hennepin County v. Savage,* 83 F. 2d 453, to the effect that taxes are an expense of administration only "when the trustee or debtor actually utilizes in the operation of the business the land upon which the taxes are assessed."

We have also quoted from a recent case in *California, Helvey v. United States Building & Loan Ass'n*, 81 Cal. App. 2d 647, which lays down the accepted rules regarding the abandonment.

> "When assets have been abandoned by a trustee or a receiver, the property, in so far as the abandoner is

concerned, is left as though he had never owned or claimed it and the 'title stands as if no assignment had been made.'

The situation presented is analogous to an unaccepted or a rejected gift—the title is left as though the gift had not been made (*Brown v. Keefe,* 300 U. S. 598, 81 L. Ed. 827; *In re Webb,* 54 Fed. 2d 1065; *In re Moss,* 21 Fed. Supp. 1019). . . . (742) Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines, the court may upon his petition authorize the abandonment of the worthless property."

We respectfully request that the Court will reconsider its ruling in the light of these authorities.

(4) "The Bankruptcy Court is given no authority to redetermine an assessment, or to divide it arbitrarily, after it has been quasi-judicially determined pursuant to state law. Arkansas Corporation Commission v. Thompson, 313 U. S. 132. Assuming the doubtful proposition that the trustee was entitled to any relief, his remedy was by application to the county board of equalization. Quinn v. Aero Services, Inc., 9 Cir., decided January 24, 1949."

We likewise respectfully submit that this Court has misconstrued the effect of *Arkansas Corporation Commission v. Thompson, supra;* for, in *Gardner v. State of New Jersey,* 329 U. S. 565, the Supreme Court itself considerably delimited many apparent generalities contained in the former decision. The essence of the two cases, as stated in

the latter, is set out at pages 16 to 20 of Appellant's Opening Brief. By way of emphasis in an effort to assist the Court, may we again set out a portion of our original quotation:

> "Fourth. The rule of Arkansas Corporation Commission v. Thompson, *supra,* does not, however, preclude the reorganization court from adjudicating the other issues raised by the objections to New Jersey's claim. The contrary view, which the Circuit Court of Appeals apparently took, fails to recognize historic bankruptcy powers which, as we have already pointed out, are part of the arsenal of authority granted the reorganization court by Section 77 . . . (3) The reorganization court may also adjudicate questions pertaining to the amount of a tax claim secured by a lien without crossing the forbidden line marked by Arkansas Commission v. Thompson, *supra.* There is, for example, the question whether the amount of the claim has been swollen by the inclusion of a forbidden penalty and thus to that extent does not meet the bankruptcy requirement for proof and allowance of claims. Section 57j of the Bankruptcy Act provides that debts owing a State as a 'penalty or forfeiture' shall not be allowed. What claims accruing before bankruptcy and sought to be proved by a State are 'penalties', New York v. Jersawit, 263 U. S. 493, and what are not. Meilink v. Unemployment Reserves Commission, 314 U. S. 564; the applicability of Section 57j to reorganizations under Section 77; the liability of the estate for penalties incurred by the trustee in the operation of the business; Boteler v. Ingels, 308 U. S. 57; what interest, if any, accrues after the petition for reorganization has been filed. Vanston v. Green, 329 U. S. . . . are all questions for the reorganization court."

The appellant believes that this Court has overlooked "the historic bankruptcy powers which . . . are part of the arsenal of authority" of the bankruptcy court. The bankruptcy court is precluded from attacking the valuations underlying an assessment or the validity of such assessment used as the basis for the computation of taxes. However, the bankruptcy court may determine whether the payment of such taxes is affected by any matter similar to those matters referred to in the previous quotation. Just as Section 57j provides that no penalty shall be paid, even though a taxing agency has said that it should be paid, so the first proviso provides that no part of a tax, even though otherwise properly assessed shall not be paid if the tax is on property in which the bankrupt estate has no interest of value. And so Section 62 provides that only proper expenses of administration shall be paid, even though based on a tax properly assessed.

Appellant points out that *Quinn v. Aero Services, Inc., supra,* is dissimilar to the instant case in that in the *Quinn* case the assessment was made prior to the filing of the petition in bankruptcy; and involves neither the first proviso nor the feature of abandonment contained herein.

The appellant likewise calls to the attention of the Court that the last sentence on page 1 of the opinion, "The balance of the bankrupt's goods, of like character with those in the field warehouse. . . ." should read "The balance of the bankrupt's goods, *some* of like character with those in the field warehouse. . . .," the word "some" having been omitted. [Tr. p. 44, third line from bottom.]

Conclusion.

The appellant respectfully submits that a rehearing of the within matter should be granted and the order of the referee should be sustained.

Dated: March 21, 1949.

FRANK C. WELLER and
RUSSELL B. SEYMOUR,
By RUSSELL B. SEYMOUR,
Attorneys for Appellant.

I, Russell B. Seymour, a member of the Bar of this Court and one of the attorneys for the appellant, hereby certify that the foregoing petition for rehearing is made in good faith and without any intent to hinder or delay appellant.

RUSSELL B. SEYMOUR.